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No. 97-1732

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Petitioners,

v.

PAUL FELZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION OF RESPONDENT ARCHER DANIELS MIDLAND COMPANY

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QUESTIONS PRESENTED

1. Should certiorari be granted to review a decision that joined many other Circuits in following an explicit holding of this Court, rejecting an anomalous decision in another Circuit that several years ago did not do so?

2. Should this Court reconsider its repeated holdings that jurisdictional rulings cannot be made prospective only, in a case presenting no compelling reasons for doing so?

LIST PURSUANT TO RULE 29.6

Respondent Archer Daniels Midland Company is a publicly held corporation. It has no parent companies and its nonwholly owned subsidiaries are Alfred C. Toepfer International, Compagnie Industrielle et Financiere, Consolidated Nutrition, L.C., Gruma S.A. de C.V., and Oelmuhle Hamburg AG.

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BRIEF IN OPPOSITION OF RESPONDENT ARCHER DANIELS MIDLAND COMPANY

STATEMENT

A. The District Court Proceedings.

In 1995 a number of derivative actions brought by shareholders of Archer Daniels Midland Company (ADM) were consolidated for hearing in the United States District Court for the Central District of Illinois. The complaints sought recovery on behalf of the corporation for alleged wrongdoing by ADM board members claimed to have resulted in antitrust violations and consequent loss to the corporation. Two years of discovery and other pretrial matters followed.

Petitioners, California Public Employees' Retirement System (CalPERS) and the Florida State Board of Administration (FSBA), are large state-employee pension

funds that own stock in ADM as well as in many other publicly traded companies. CalPERS is the largest governmental pension fund in the United States, with assets exceeding $110 billion; FSBA's assets exceed $83 billion. A. 4a.[1] Both are members of the Council of Institutional Investors, an association of large pension funds. A. 4a, 11a. In 1996 the Council was contacted about the suit, and discussed it with the plaintiffs' attorneys. A. 7a-8a. In May 1997 counsel for the plaintiffs, the directors, and ADM negotiated a settlement, calling for payment by the directors of $8,000,000 (including $3,920,000 for attorneys fees and expenses), restructuring of the board, and extensive procedures to increase director independence and safeguard against illegal conduct. All ADM shareholders received written notice, and there was publicity in the financial press as well.

In July 1997 the District Court held a hearing on whether to approve the proposed settlement. Petitioners appeared by counsel and, by written briefs, affidavits and oral argument, objected to the proposed settlement. They argued that the settlement's new "corporate governance" procedures should have included even more of the provisions the Council of Institutional Investors advocates for publicly held corporations, and that the allocation for attorneys' fees was excessive. Petitioners filed affidavits that detailed their efforts through the Council to increase independence of directors in corporations, alter voting procedures, and make other internal corporate changes, policies that the Council presses all major corporations to adopt. A. 11a-12a. They explained that:

> "ADM has been a poster child for the corporate governance movement for years. The settlement of this derivative action offers an unprecedented opportunity to implement changes in ADM's bylaws that will benefit ADM and its shareholders. This opportunity should not be squandered."

[1] Citation to "A." are to the Addenda to this brief.

A. 9a. They attached and submitted an article that explained:

> "Trustees and staff of the California Public Employees' Retirement System are developing guidelines to grade companies in Calpers's portfolio on the independence of their boards. Calpers cannot be ignored: Its $80 billion in equities make it one of the nation's largest shareholders and a force to be reckoned with in the governance arena. . . .
>
> "CEOs who resist pressure for strong governance risk having Calpers or regulatory bureaucrats tell them what kind of board they should have . . . ."

A. 16a, 19a. Acknowledging that ADM already had adopted some of the kinds of changes advocated by the Council, its Executive Director called it "surprising and disappointing" that the settlement agreement did not include more—such as some that ADM's shareholders had voted to reject when petitioners had proposed them. A. 15a, 13a.

Petitioners did not move to intervene in the District Court. One of the counsel for the shareholder plaintiffs observed to the District Court that

> "I would also note that [the Council of] Institutional Investors and specifically CalPERS knows how to come in and make itself known when it wants to. It has done it in a litigation pending in the Supreme Court of New York County *In Re: W. R. Grace* where CalPERS saw fit to bring on an order to show cause to make itself either sole or an additional co-lead counsel. They know how to do it when they want to, judge."

Tr. 7/7/97, p. 9. The attorneys for petitioners did not respond to that point, and never explained to the District Court their failure to intervene.

The District Court approved the settlement and entered judgment accordingly. Petitioners thereupon, still with-

out moving to intervene, filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. Their notice characterized themselves as "Objectors . . . each of whom is entitled to appeal." A. 2a.

B. The Court of Appeals' Ruling.

Some of the respondents moved to dismiss the appeal on the ground that petitioners, because they had chosen to remain nonparties, had no right to appeal. Respondents cited this Court's decision in *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988), and a Seventh Circuit opinion that had followed *Marino* and held in a class action that "A nonparty has no right to appeal." *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456, 457 (7th Cir. 1997).

Petitioners responded that they had "believed that it was not necessary to burden the district court with a motion to intervene." Memorandum in Opposition to Plaintiffs' Motion To Dismiss, No. 97-282 U.S.C.A., 7th Cir., at 3 n.2 (Aug. 28, 1997). They said that they had relied on a footnote in a pre-*Marino* Seventh Circuit decision, *Tryforos* v. *Icarian Dev. Co.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975) (Stevens, J.), *cert. denied sub nom. Manta* v. *Tryforos*, 423 U.S. 1091 (1976). *Id.* at 2.

The Court of Appeals (Posner, C.J., and Flaum and Easterbrook, JJ.) dismissed petitioners' non-party appeal on authority of *Marino* v. *Ortiz* and Rule 3(c), Fed. R. App. P. In an opinion by Judge Easterbrook, the court noted that this Court in *Marino* had held that "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." Pet. App. 1a, quoting 484 U.S. at 304. That decision, the Court of Appeals held, was of course controlling, and reflected the requirement of Rule 3(c) that "A notice of appeal must specify the *party or parties* taking the appeal . . . ." *Id.* at 2a (emphasis in opinion).

The court noted that in *Brand Name, supra*, it had previously applied *Marino* to an attempt by a non-party to appeal a class action judgment, and that the rule for shareholder derivative suits was no different. Pet. App. 4a. In fact, the court observed, shareholder derivative suits were an *a fortiori* context for applying *Marino*, because unlike ordinary class members, shareholders in a derivative action assert no personal claim, but only the interest of the corporation. Pet. App. 4a-5a, citing *Smith* v. *Sperling*, 354 U.S. 91 (1957). The Court of Appeals noted its disagreement with a 1993 Third Circuit decision which with only passing reference to *Marino* had permitted a non-party in derivative litigation to appeal; that opinion, the Court of Appeals observed, had considered only the issue of standing, without analyzing the distinct issue of party status ruled upon in *Marino*. Pet. App. 6a-7a, discussing *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993). "Parties are a subset of injured persons. Equating injury with party status is exactly the approach disapproved by *Marino*." Pet. App. 7a.

Finally, the Court of Appeals held, citing *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981), and similar decisions of this Court, that there was no authority to make the jurisdictional ruling only prospective. Pet. App. 7a. It declined to follow a recent Ninth Circuit decision that had made an overruling involving a local rule applicable to the Northern Mariana Islands prospective "on equitable grounds." Pet. App. 7a, citing *George* v. *Camacho*, 119 F.3d 1393 (9th Cir. 1997) (*en banc*). The Court of Appeals added that even if there could exist some "equitable grounds" exception to the rule that jurisdictional rulings may not be prospective only, its holding in this case was not novel and was clearly required by *Marino* and its own prior holding in *Brand Names* that non-parties in class actions may not appeal. Pet. App. 1a-2a.

REASONS FOR DENYING THE WRIT

The judgment that petitioners ask this Court to review simply adds one more to a series in which the various Circuits, obedient to this Court's holding in *Marino* v. *Ortiz*, 484 U.S. 301 (1988), have held that shareholders or class members who do not make the minimal effort of moving to intervene may not appeal a district court's judgment. Although at one time there was a wide disagreement among the Circuits on this point, that has changed, and after *Marino* little if any disagreement remains. One by one, as the Circuits have had occasion to readdress the issue in light of *Marino*, they have been coming into agreement, and any conflicts that existed in the past have been disappearing. Thus the Seventh Circuit, which in 1975 had held otherwise, here confirmed that in light of *Marino*, any of its previous decisions that allowed non-parties in derivative actions to appeal did not accurately state the law.

The petition really is focused not on that ordinary and expectable holding of the Seventh Circuit, which joined many others, but rather on a decision of a panel in the Third Circuit five years ago that relied on a pre-*Marino* decision, considered standing rather than party status, and scarcely addressed *Marino* at all. *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304 (3d Cir. 1993). To the extent that the Third Circuit did not get the message of *Marino* five years ago, there is no reason to believe that it will not ultimately correct its jurisprudence—just as the present case shows that the Seventh Circuit now has done. Any split in the Circuits that once existed has been shrinking, not growing. If the Third Circuit, which so far has never fully addressed the impact of *Marino*, ultimately does so and nevertheless adheres to an anomalous position, there will be ample opportunity to present such a decision from that Circuit for this Court's review when and if it arises. *Cf. E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

As for the second question the petition seeks to raise, once again, this Court has already firmly settled it. Jurisdictional rulings cannot be made prospective only. *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). Nor, even if they could, would there be reason to do so here. This is not a case, like the unusual Ninth Circuit decision petitioners cite, of an abrupt overruling of a court's own precedent on a local rule at the expense of a bewildered litigant. See *George* v. *Camacho*, 119 F.3d 1393 (9th Cir. 1997) (*en banc*). On the contrary, this Court itself has observed that the rule that non-parties may not appeal "is well settled." *Marino*, 484 U.S. at 304. Petitioners have frequently intervened in derivative actions. See p. 20, *infra*. Sophisticated litigants like petitioners, who made a calculated tactical judgment in this case to avoid the obligations of party status, would be in a poor posture to claim ignorance.

As to both the questions petitioners say are presented, they have brushed aside the fact that these points have already been settled both by the weight of circuit authority and by decisions of this Court. Instead, they have struggled to locate in some other Circuit some anomalous case—one that is contrary to this Court's decisions, is not followed in other Circuits, and is significantly factually different besides—and invoke that odd decision as an excuse for seeking certiorari to review the Seventh Circuit's ordinary and well reasoned opinion, which like many others *does* follow this Court's holdings, and actually has *diminished* any previous intercircuit disagreement. There is no need for this Court to revisit these settled issues, and very likely there never will be. Nothing in this case presents an occasion or need for certiorari.

I. THE COURT OF APPEALS, LIKE MANY OTHERS, SIMPLY FOLLOWED THIS COURT'S HOLDING IN *MARINO* v. *ORTIZ*.

A. Previous Disagreement in the Circuits Has Been Disappearing.

Petitioners three times quote the Court of Appeals' observation that "[c]ourts have disagreed for several decades" about whether non-party class members and shareholders may appeal. Pet. Cert. at 2, 11, Reply at 1, quoting Pet. App. 2a. Petitioners also argue that the shareholder respondents "do not offer any means of reconciling this split of authority." Reply at 1.

On the contrary. The Court of Appeals after its language that petitioners quote went on to explain that the decades-old issue was settled when this Court decided *Marino*. Pet. App. 2a-4a. And any remnant of the previous split has been "reconciling" itself. Since *Marino* one Circuit after another in both class actions and derivative suits has been falling into line—just as the Seventh Circuit, which before *Marino* had taken the opposite position, did here. The Seventh here joined five other Circuits. See *Loran* v. *Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1075 (5th Cir. 1988); *Shults* v. *Champion Int'l Corp.*, 35 F.3d 1056, 1060-61 (6th Cir. 1994); *Croyden Associates* v. *Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992), *cert. denied sub nom. Harry and Jeanette Weinberg Foundation* v. *Croyden Associates*, 507 U.S. 908 (1993); *Gottlieb* v. *Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993); *Guthrie* v. *Evans*, 815 F.2d 626, 627 (11th Cir. 1987) (*pre*-Marino).

All that today remains of the anti-*Marino* position is a 1993 Third Circuit opinion, *Bell Atlantic, supra*, whose authority is undercut by its complete failure to address the issue of party status as distinct from standing, and its failure to reconcile its view with *Marino*. Like the Cheshire Cat, the anti-*Marino* jurisprudence has been steadily fading from view. Only a feeble smile—a Third Circuit decision of five years ago that did not analyze the issue—remains.

What petitioners present is an issue of past nonconformity by the Third Circuit with a decision of this Court, not a split among two groups of Circuits on some major issue this Court has yet to address. If five years ago the Third Circuit failed to analyze *Marino* and follow it, that raises no need to review this case, in which the Seventh Circuit like many others did so. If rejection of *Marino* turns out really to be the current Third Circuit view, there will be future opportunities to review such a Third Circuit decision when and if the need arises.

B. This Court Has Rejected Nearly Identical Petitions in the Past.

This Court on at least four occasions has denied petitions for certiorari just like the one here. And its wisdom in doing so has been vindicated, as division in the Circuits has steadily shrunk.

When the Eighth Circuit, citing *Marino* v. *Ortiz*, held that non-party class members may not appeal, that court like the Seventh Circuit here wrote a thoughtful and strong opinion, which even commented, discussing cases from the Third and Seventh Circuits, that "[t]he circuits are divided on this issue." *Croyden Associates* v. *Alleco Inc.*, 969 F.2d 675, 678 (8th Cir. 1992). The non-parties then urged this Court that "The Eighth Circuit's Decision Is In Conflict With Decisions of Other Courts of Appeal," referring particularly to decisions in the Sixth, Seventh and Third Circuits. Petition for Writ of Certiorari, *Harry and Jeanette Weinberg Foundation, Inc.* v. *Croyden Associates*, No. 92-613, OT 1992, at 8 (1992). This Court denied certiorari. *Harry and Jeanette Weinberg Foundation, Inc.* v. *Croyden Associates*, 507 U.S. 908 (1993).

Next the Sixth Circuit, in spite of a prior holding,[2] announced that non-party class members who had not moved to intervene could not appeal. *Bowling* v. *Pfizer, Inc.*, 14 F.3d 600 (table), 1993 U.S. App. Lexis 33691 (6th Cir. 1993). Once again there was a petition for certiorari, arguing that "There Is A Deep Split In The Circuits," referring this time to decisions in the Seventh and Third. Petition for Writ of Certiorari, *Ridgeway* v. *Pfizer, Inc.*, No. 93-1912, OT 1993, at 12 (1994).[3] Once again, this Court denied certiorari. *Ridgeway* v. *Pfizer, Inc.*, 513 U.S. 916 (1994).

The following Term, this Court was petitioned again to review the issue of non-party appeals, those petitioners claiming that they had lacked a "crystal ball" and so could not have predicted that the Sixth Circuit would follow this Court's decision in *Marino* instead of its own earlier cases. Petitioners' Reply Brief in Opposition, *Ridgeway* v. *Pfizer, Inc.*, No. 94-843, OT 1994, at 8 (1994). This Court once again denied certiorari. *Ridgeway* v. *Pfizer, Inc.*, 513 U.S. 1103 (1995). The same petitioners later raised the issue again, and this Court denied certiorari again. *Ridgeway* v. *Pfizer, Inc.*, 118 S. Ct. 263 (1997) (No. 97-47).

Only one thing has changed in the interval: the pre-*Marino* split in the Circuits has continued to get smaller. For now the Seventh Circuit, previously aligned with the Third, has acknowledged *Marino* and unequivocally joined the other Circuits. This leaves the Third Circuit, to the extent it can be thought to have a post-*Marino* position, all alone.

Petitioners argue that "[t]he panel below virtually invited certiorari." Pet. Cert. 11. But no more than had the Eighth Circuit in *Croyden Associates* when it noted the

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2 See *Cohen* v. *Young*, 127 F.2d 721, 724 (6th Cir. 1942).

3 The petition also cited a pre-*Marino* decision of the Ninth Circuit, *In re Cement Antitrust Litigation*, 688 F.2d 1297 (9th Cir. 1982), *aff'd for absence of quorum sub nom. Arizona* v. *United States District Court*, 459 U.S. 1191 (1983).

much wider disagreement in 1993. The Seventh Circuit in its thorough and candid opinion simply acknowledged that some inconsistent authority remained on the books, and pointed out that the Third Circuit had never analyzed the issue of party status as distinct from standing, and was not to be followed because of this Court's holding in *Marino*. Pet. App. 6a-7a. Moreover, this Court has no practice of automatically granting certiorari whenever one court notes disagreement with another, or even when (not the case here) a court of appeals requests it.[4]

C. There Is No Conflict Requiring This Court's Intervention.

The Fifth, Sixth, Eighth, Tenth and Eleventh Circuits all agree with the Seventh. See p. 8, *supra*. The Second by implication does also. See *New York* v. *Reebok Int'l, Ltd.*, 96 F.3d 44, 48 (2d Cir. 1996) (holding that under *Marino* non-parties could not appeal settlement of *parens patriae* litigation). There are no post-*Marino* cases that disagree except, as of 1993, in the Third. In 1971 that Circuit, without ever adverting to the issue of intervention, held that class members who had not opted out had "standing to appeal" a settlement. *Ace Heating & Plumbing Co.* v. *Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971). In 1993, under the heading "Standing," the Third Circuit held that its holding in *Ace Heating* was dispositive in a shareholder derivative action, and that "[t]hough *Ace* did not discuss whether objecting class members should be required to intervene as a condition for appellate standing, rejection of such a requirement was essential to its reasoning and result." *Bell Atlantic Corp.* v. *Bolger*, 2 F.3d 1304, 1309 (3d Cir. 1993). The opinion mentioned in passing *Marino* and Rule 3(c), Fed.

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4 *Cf. Mayes* v. *Pickett*, 537 F.2d 1080, 1083-84 (9th Cir. 1976) ("Perhaps this case presents a record which will attract the attention of the Supreme Court. The conflict between the circuits should be settled."), *cert. denied sub nom. United States* v. *Mayes*, 431 U.S. 924 (1977) (denying petition of United States).

R. App. P., 2 F.3d at 1307, but adhered to its pre-*Marino* case. The opinion gave weight to what it perceived as "risks flowing from shareholders' difficulty in monitoring derivative litigation," concluding that "[g]iven the agency, collective action, and information problems inherent in settlements of derivative litigation, and the broad view of objector standing embodied in *Ace*, we conclude Lazar had standing to appeal the district court order approving the settlement." 2 F.3d at 1310.

At most the holding of the Third Circuit panel five years ago in *Bell Atlantic* represents an anomalous ruling that failed to distinguish standing from the requirements of Rule 3(c) and *Marino*, and has not been followed by other courts of appeals—which is not surprising, given this Court's clear holding in *Marino*. There is no reason for this Court to revisit settled law now—particularly when the practical effect is so small, because under *Marino* all that an objector need do to ensure an appeal right is move to intervene. If the Third Circuit finally analyzes the issue and then persists in ignoring this Court's ruling, there will be time enough, if it then seems appropriate, to review a Third Circuit case failing to follow *Marino*.[5]

Petitioners also, although more haltingly, claim a conflict with the Tenth Circuit, but the cases show just the opposite. The Tenth Circuit in a class action case very clearly held that

> "For the above reasons, we agree with the Eleventh Circuit that formal intervention is a prerequisite to an unnamed class member's standing to appeal . . . . We note that the Eighth and Fifth Circuits have recently come to the same conclusion."

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[5] The reasoning of *Bell Atlantic* was already undercut in the Third Circuit a month later in *Carlough* v. *Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), which in holding that a class member who *did* move to intervene would be allowed at some point to appeal, specifically distinguished cases in which class members or shareholders had not moved to intervene. See 5 F.3d at 713-14.

Gottlieb v. *Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993). In fact, its opinion added presciently that "we believe that the tone of *VMS* indicates that the Seventh Circuit will ultimately adopt the rule we set forth today." *Id.* at 1011, referring to *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992).

A subsequent Tenth Circuit opinion reiterated and confirmed that holding, explaining that "This court has recently joined the circuits that require intervention by a class member in a Rule 23(b)(3) case in order to have standing to appeal the district court's approval of the settlement." *Rosenbaum* v. *MacAllister*, 64 F.3d 1439, 1442 (10th Cir. 1995). Although in dictum suggesting that its *Gottlieb* opinion did not necessarily control in a derivative suit, the court nevertheless strongly endorsed *Gottlieb*'s reasoning in terms that apply to both:

> "To allow a nonintervening class member to appeal approval of a settlement would permit one dissent—and there is likely always to be one—to postpone realization of any of the benefits that might otherwise come to the class members and to prevent the defendant from settling its liability."

64 F.3d at 1442. The case went on to conclude that the rule need not apply when, unlike here, the non-party did not challenge the settlement, and there was only a dispute over attorneys' fees. Whether or not that distinction, which no other case has followed, is correct, it would not apply here, for petitioners as non-parties attempted to appeal the entire setlement. On that issue, the position of the Tenth Circuit is firmly with that of the Seventh and others.

Petitioners attempt to distinguish some of the post-*Marino* cases on the ground that the attempts by non-parties to appeal arose in class actions, not derivative suits. Pet. 12 n.10. But as the Court of Appeals pointed out, derivative suits are logically an even more obvious case for application of *Marino*. Pet. App. 4a. Indeed, if this Court ever thought there was some need to reexamine *Marino*, the better vehicle for doing so would be an ordi-

nary class action, in which, unlike derivative suits, the class members at least have claims to assert in their own right. Certainly the present decision, simply joining others in following *Marino*, does not create any serious and live disagreement in the lower courts that requires this Court's intervention at this time.

D. The Holding Is Clearly Correct.

The Court of Appeals' reasoning is exceptionally clearly stated and need not be reiterated here. The logic of its holding is confirmed by the fact that since *Marino* (and in some instances before), at least five other Circuits have held the same thing.

According to petitioners, Rule 3(c) is "far too thin a reed." Pet. Cert. 22. But it is a duly adopted rule that has the force of law, and "a jurisdictional prerequisite." *Torres* v. *Oakland Scavenger Co.*, 487 U.S. 312, 318 (1988); 28 U.S.C. § 2072. This Court found it authoritative in *Marino*, 484 U.S. at 304. Petitioners also argue that Rule 3(c) should have been treated as merely restating prior law. But in *Marino* this Court held that it did just that, citing as an example of prior law *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917); see also, *e.g.*, *Karcher* v. *May*, 484 U.S. 72, 77 (1987); *Ex parte Leaf Tobacco Bd. of Trade*, 222 U.S. 578, 581 (1911) ("[o]ne who is not a party to a record and judgment is not entiled to appeal therefrom").[6]

The petition includes citations to commentators. Some of those are policy discussions, more properly addressed to legislation or rulemaking than to adjudication. And those that petitioners cite as summarizing the law turn out to provide little support for petitioners' position:

—For example, petitioners twice quote a line from one treatise that "objector to the settlement may appeal the

[6] Intervention is not necessary for appeal when a district court itself has effectively conferred party status by directing an order against the appellant personally. *E.g.*, *Keith* v. *Volpe*, 118 F.3d 1386, 1391 n.7 (9th Cir. 1997); see also examples at Pet. Cert. 20 n.21.

court's approval of the compromise." Pet. Cert. 8 n.8, Reply at 4 n.5, quoting 7C C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1839 at 182 (2d ed. 1986). Those words do appear, without discussion or analysis, in the treatise; but the only authority the treatise cites for them is a passing dictum in a footnote in a pre-*Marino* district court case from the Third Circuit.[7] Elsewhere the same commentators acknowledge that while they believe in some circumstances class members ought to be allowed to appeal,

> "it has been ruled that an individual class member who has not been recognized as a class representative and who has not intervened lacks standing to appeal a judgment on the merits. Similar rules may apply to corporate shareholders affected by the judgment in a derivative action."

15A *id.* § 3902.1 at 105-06 (footnotes omitted).[8]

—Moore's treatise, which petitioners also cite, refers to a "split in authority"—as to which it cites pre-*Marino* cases, with no post-*Marino* cases supporting petitioners' position except in the Third Circuit.[9] See 5 J. MOORE, MOORE'S FEDERAL PRACTICE § 23.1.10[3] (3d ed. 1998).[10]

[7] *Webcor Electronics* v. *Whiting*, 101 F.R.D. 461, 465 n.11 (D. Del. 1984). The supplement updating the same page of the treatise adds reference to the Third Circuit's *Bell Atlantic* case—stating in boldface that the opinion cited the treatise—but fails to mention any of the many contrary decisions, or even *Marino*. 7C C. WRIGHT *et al.*, 1998 Supp. at 13 n.22.

[8] Petitioners' opening quote to Wright & Miller is out of context and does not deal with non-party appeals at all. *Compare* 7C WRIGHT *et al.* § 1839 at 175 *with* Pet. Cert. 2 n.1. Their quote from a law encyclopedia, 10 FEDERAL PROCEDURE, LAWYERS EDITION 260 (1994), see Pet. Cert. 8 n.8, relies entirely on the Seventh Circuit's overruled *Tryforos* decision.

[9] It notes that the Tenth Circuit in *Gottlieb* held that non-parties may not appeal a settlement, citing also the *Rosenbaum* decision regarding a limited attorneys' fees challenge, discussed *supra* p. 13.

[10] Petitioners five times invoke a comment by a law student who criticized this Court's holding in *Marino*. Pet. Cert. 13, 18 (twice),

Petitioners' speculation that intervention motions would likely be denied, Reply at 6, is both unsupported and beside the point. Rule 24, Fed. R. Civ. P., allows intervention even after judgment, see *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), and the reports are full of cases in which intervention in shareholder suits and derivative actions has been unhesitatingly granted. Moreover, as this Court pointed out in *Marino*, once a shareholder moves to intervene, the denial of such a motion itself is "of course" appealable. 484 U.S. at 304.[11]

Petitioners' policy arguments—that intervention somehow imposes a terrible (albeit vaguely described) burden on dissident shareholders—have an especially hollow ring in the circumstances of this case. Moving to intervene is scarcely a forbidding burden, particularly for gigantic organizations like petitioners, who have their own well-publicized agenda for altering the governance of U.S. corporations by means of litigation. See A. 6a, 8a-9a.

The petition also surely exaggergates in asserting that "[a] key procedural safeguard against collusion and abuse is also at stake," Pet. Cert. 14, simply because one more

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Reply 6, 8; Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. CHI. L. REV. 933, 946 (1993). By contrast, the Reporter of the Rules Advisory Committee emphasized that participation by a class member was not intended by the drafters of the Rules to amount to party status. "If 'appearance' [in Rule 23] is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under rule 24 . . . ." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 392 n.137 (1967).

11 "Federal appellate courts . . . routinely hear appeals from denials of motions to intervene as of right, even though 'Federal Rules of Appellate Procedure 3 and 4 clearly contemplate that only parties may file a notice of appeal.'" *Marine Mammal Conservancy, Inc.* v. *Department of Agriculture*, 134 F.3d 409, 412-13 (D.C. Cir. 1998), quoting in part *United States* v. *City of Oakland*, 958 F.2d 300, 301 (9th Cir. 1992).

Circuit has held that shareholders must intervene before appealing. Much of the petition is devoted to arguing the benefits of shareholder monitoring of derivative-suit settlements. But that is not at issue. Shareholder procedural rights have been provided and delineated in Rule 23.1, Fed. R. Civ. P. No one is arguing against proper shareholder participation, and neither *Marino* nor the Seventh Circuit's decision nor the many similar decisions in other Circuits significantly affects shareholder rights at all. Objectors who wish to appeal need only move to intervene. Petitioners have never presented any good reason not to have done so. *Cf. U.S. Philips Corp.* v. *Windmere Corp.*, 971 F.2d 728, 730 (Fed. Cir. 1992) (non-party's "asserted interest" questionable when he "refrained from intervention at the trial"), *cert. dismissed sub nom. Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27 (1993); *Kahn* v. *Chase Manhattan Bank, N.A.*, 131 F.3d 131 (table), 1997 U.S. App. Lexis 33510 at *5 (2d Cir. 1997) ("proposed plaintiffs' failure to move to intervene here, moreover, belies their assertions of a strong interest in this litigation").

Petitioners misunderstand the issue as "a policy decision" involving "purely discretionary, self-imposed restrictions on jurisdiction," "purely prudential." Pet. Cert. 27, 3, 28. As if Rule 3(c) and *Marino* did not exist, they attempt to assemble policy arguments for allowing non-party appeals. There are certainly powerful considerations on the other side as well, considerations that judges recognize better than anyone. As the Tenth Circuit observed with respect to class actions,

> "If individual appeals without formal intervention were to be permitted, the class action would break down under the burden of unpredictable and unlimited individual actions."

Gottlieb v. *Wiles*, 11 F.3d 1004, 1009 (10th Cir. 1993); see also, *e.g.*, *Guthrie* v. *Evans*, *supra*, 815 F.2d at 628 ("class actions could become unmanageable"). Also, there is an "interest in encouraging settlements, particularly in

class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources." *Mayfield* v. *Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993).[12] In any event, the short answer is that the Federal Rules, as this Court recognized in *Marino*, simply do not enact what petitioners want. See Fed. R. Civ. P. 23.1; Fed. R. App. P. 3(c). Petitioners' less-than-compelling policy arguments should be directed to the policy makers: the Congress, or the drafting committees who recommend Rule changes to this Court.

II. NO SUBSTANTIAL ISSUE REGARDING PROSPECTIVITY IS PRESENTED.

The second question presented in the petition is insubstantial for several reasons.

1. Once again petitioners are challenging something this Court already has firmly and recently decided. In explaining that its jurisdictional ruling could not, as petitioners requested, be made prospective only, the Court of Appeals pointed out that it was simply following unequivocal holdings of this Court. See Pet. App. 8a-10a, citing *Landgraf* v. *USI Film Products*, 511 U.S. 244, 274

[12] The burden on appellate courts is heavy enough without adding appeals of settlements by non-parties. For one example, the Sixth Circuit earlier this year commented in a class action opinion that "[t]he remarkable aspect of this outpouring of judicial resources is that much of it occurred after the case settled." *Bowling* v. *Pfizer, Inc.*, 132 F.3d 1147, 1148 (6th Cir. 1998). Previous appeals in the same case that had required the Sixth Circuit to file opinions or enter orders (also leading to three petitions for certiorari) include: *Bowling* v. *Pfizer, Inc.*, 1997 U.S. App. Lexis 3782 (6th Cir. 1997); *Bowling* v. *Pfizer, Inc.*, 103 F.3d 128 (table), 1996 U.S. App. Lexis 33200 (6th Cir. 1996), *cert. denied sub nom. Ridgeway* v. *Pfizer Inc.*, 118 S. Ct. 263 (1997); *Bowling* v. *Pfizer, Inc.*, 102 F.3d 777 (6th Cir. 1996); *Bowling* v. *Pfizer, Inc.*, 1995 U.S. App. Lexis 38851 (6th Cir. 1995); *Bowling* v. *Pfizer, Inc.*, 14 F.3d 600 (table), 1993 U.S. App. Lexis 34016 (6th Cir. 1993), *cert. denied sub nom. Ridgeway* v. *Pfizer, Inc.*, 513 U.S. 1103 (1995); *Bowling* v. *Pfizer, Inc.*, 14 F.3d 600 (table), 1993 U.S. App. Lexis 33691 (6th Cir. 1993), *cert. denied sub nom. Ridgeway* v. *Pfizer, Inc.*, 513 U.S. 916 (1994); *Bowling* v. *Pfizer, Inc.*, 995 F.2d 1066 (table), 1993 U.S. App. Lexis 14739 (6th Cir. 1993).

(1994); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993); *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988); *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); and *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). "[B]y definition, a jurisdictional ruling may never be made prospective only." *Firestone*, 449 U.S. at 379.

2. Petitioners rely on a peculiar Ninth Circuit decision which they say is in conflict because the Ninth Circuit applied a jurisdictional ruling prospectively. *George* v. *Camacho*, 119 F.3d 1393 (9th Cir. 1997) (*en banc*). That 6-5 decision, in an opinion by Judge Reinhardt, after describing a highly unusual fact situation, either distinguished or declined to follow this Court's decisions in *Firestone* and *Budinich*, and held that a change in the court's prior holding as to time for certain appeals would be prospective only. There are enormous factual and procedural differences between this case and that one, which involved application of a changed interpretation of an arguably misleading local rule to an unsophisticated litigant in the Northern Mariana Islands.

At best, the opinion in *George* depended upon its own extremely unusual facts. At worst, it appears to be a decision never followed elsewhere and unlikely to be, because "the majority fails to follow clearly applicable Supreme Court precedent." 119 F.3d at 1404 (T. Nelson, J., and four others dissenting). What petitioners call a "considered decision[]," Pet. Cert. 8, another dissent dismissed as "twaddle," "supported by neither law nor justice" and "rest[ing] entirely on air, and not cold air, either." 119 F.3d at 1410-11 (Kozinski, J., joined by O'Scannlain, J., dissenting). The Seventh Circuit cited it only to acknowledge its existence and note its exceptional nature. Pet. App. 7a. Conceivably, if certiorari had been sought in that Ninth Circuit case, there might have been reason, in spite of its unique factual situation, for this Court to

have reviewed it—not as a Circuit conflict, but rather under this Court's Rule 10(c) as a decision "that conflicts with relevant decisions of this Court." But surely such an anomalous opinion, rendered over considerable protest in another Circuit, is no reason whatsoever to review the Seventh Circuit's rather commonplace *adherence*, in wholly different facts, to *Firestone* and the other decisions of this Court.

3. Even if—contrary to this Court's decisions—it were possible based on some case-specific leniency to make a jurisdictional ruling apply only in the future, no reason to do so existed here. Petitioners could not remotely be regarded as unsophisticated in the ways and rules of litigation. *Cf. Houston* v. *Lack*, 487 U.S. 266, 270 (1988) ("The situation of prisoners seeking to appeal without the aid of counsel in unique"). It was actually pointed out to petitioners in the District Court that they had failed to intervene, even though in other derivative actions they had done so. See p. 3, *supra*, referring to *Weiser* v. *Grace* No. 95-106285 (Sup. Ct., N.Y. County) (order Sept. 3, 1996 granting intervention by CalPERS in derivative action); see also, *e.g.*, *Kahn* v. *Sulivan*, 594 A.2d 48, 50 (Del. 1991) (intervention by CalPERS in derivative action).

Petitioners simply deliberately chose not to intervene, and when their appeal was challenged, argued that they had believed the Seventh Circuit's rule was different, based on a footnote in its 1975 *Tryforos* opinion. But as the Court of Appeals made clear, after *Marino* and the Seventh Circuit holdings in *Brand Name* and *VMS*, as well as the many cases in accord in other Circuits, no basis existed for such reliance. In words petitioners apply to others, they "ignored multiple warning signals." Pet. Cert. 30. Petitioners' assertion that in not intervening they relied on "settled law," Pet. Cert. 3, is belied by the very words of this Court: "The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled." *Marino*, 484 U.S. at 304.

Moreover, petitioners acknowledge that tactical considerations apply to what they did. In their words, as parties

> "they would face all the duties associated with becoming a party, including duties to comply with automatic disclosure requirements, appear for depositions, answer interrogatories, and produce documents."

Reply at 7. Petitioners preferred instead to take a chance. They have no attractive claim for relief from the results of a tactical gamble. This Court's prohibition of prospective-only jurisdictional rulings, now followed by the lower courts dozens if not hundreds of times, need not be revisited, particularly in a case where sophisticated litigants could not have demonstrated any compelling reasons for a special dispensation.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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July 22, 1998

ADDENDA

ADDENDUM A

[Filed Jul. 15, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

Case No. 95-2279

Honorable Harold A. Baker
Judge Presiding

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST—1991 and SANDRA ESNER,
Plaintiffs,

v.

DWAYNE O. ANDREAS, *et al.*,
Defendants,

and

ARCHER DANIELS MIDLAND COMPANY,
a Delaware Corporation,
Nominal Defendant.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consolidated C.A. No. 14403

IN RE: ARCHER DANIELS MIDLAND COMPANY

NOTICE OF APPEAL BY CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM AND FLORIDA STATE BOARD OF ADMINISTRATION

Notice is hereby given that Objectors California Public Employees' Retirement System ("CalPERS") and Florida State Board of Administration ("SBA"), each of whom is entitled to appeal from the Final Judgment and Order of Dismissal (July 7, 1997), and Order Awarding Attorneys' Fees and Reimbursement of Expenses (July 7, 1997), hereby appeal from such Judgment and Order to the United States Court of Appeals for the Seventh Circuit.

A joint appeal is practicable because, as is described in CalPERS and SBA's joint Objections to the Settlement (July 3, 1997), CalPERS and SBA's interests are aligned.

Respectfully submitted,

/s/ Mark C. Hansen
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STEVEN F. BENZ
D.C. Bar No. 428026
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Attorneys for
California Public Employees' Retirement Systems, Inc. and the Florida State Board of Administration

Date: July 14, 1997

ADDENDUM B

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

Case No. 95-2279

Honorable Harold A. Baker
Judge Presiding

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST—1991 and SANDRA ESNER,
Plaintiffs,

v.

DWAYNE O. ANDREAS, *et al.*,
Defendants,

and

ARCHER DANIELS MIDLAND COMPANY,
a Delaware Corporation,
Nominal Defendant.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consolidated C.A. No. 14403

IN RE: ARCHER DANIELS MIDLAND COMPANY

OBJECTIONS OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM AND FLORIDA STATE BOARD OF ADMINISTRATION TO PROPOSED SETTLEMENT OF DERIVATIVE ACTIONS

* * * *

Interests of the Objectors

Objector California Public Employees' Retirement System ("CalPERS") is the nation's largest governmental ("public") pension fund: it manages assets with a current market value of more than $110 billion on behalf of over one million U.S. citizens who are its employees and beneficiaries. CalPERS currently owns more than 2.8 million shares of ADM stock, and on information and belief is one of the largest single holders of ADM shares.

Objector Florida State Board of Administration ("SBA") is also a large public pension fund, with assets having a market value of over $83.3 billion for the Florida Retirement System Trust Fund, the Local Government Surplus Funds Trust Fund, and other various trust funds on behalf of 586,796 employees and 149,571 current beneficiaries. SBA currently owns 1,765,977 shares of ADM stock.

Objectors CalPERS and SBA are, on information and belief, the largest ADM shareholders that have taken any public position on the proposed Settlement.

Lawyers for the nominal plaintiffs contacted the Council of Institutional Investors ("Council")—a prominent organization of large institutional shareholders, whose members control more than $1 trillion in assets—regarding this litigation. CalPERS and SBA, who are both members of the Council, informed ADM that major shareholders would object to the proposal as inadequate and unfair to ADM shareholders, for the reasons stated in this memorandum. ADM has ignored these objections and

instead has pressed forward for Court approval of the proposed Settlement. *See* Declaration of Ann L. Yerger ("Yerger Decl.") ¶¶ 9, 10.

* * * *

Respectfully submitted,

/s/ Mark C. Hansen
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Attorneys for
California Public Employees Retirement Systems, Inc. and the Florida State Board of Administration

Date: July 2, 1997

ADDENDUM C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

Case No. 95-2279

Honorable Harold A. Baker
Judge Presiding

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST—1991 and SANDRA ESNER,
Plaintiffs,
v.
DWAYNE O. ANDREAS, *et al.*,
Defendants,
and
ARCHER DANIELS MIDLAND COMPANY,
a Delaware Corporation,
Nominal Defendant.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consolidated C.A. No. 14403

IN RE: ARCHER DANIELS MIDLAND COMPANY

DECLARATION OF ANN L. YERGER

Ann L. Yerger hereby declares pursuant to 28 U.S.C. § 1746:

1. I am over eighteen years of age and have personal knowledge of the matters stated herein.

2. I am currently employed by the Council of Institutional Investor's [*sic*] (the "Council") as director of the Council's research service. The Council is located at 1730 Rhode Island Avenue, Suite 512, Washington, D.C. 20036. The Council is an association of more than 100 public corporate and union pension funds, with more than $1 trillion in assets. I have been employed by the Council since January 1996. Prior to that I was employed for five years by the Investor Responsibility Research Center as Deputy Director of the Center's Corporate Governance Service.

3. On November 5, 1996, Jacob A. Goldberg of the law firm Spector & Roseman, P.C., called me at the Council of Institutional Investors to describe the Archer Daniels Midland Company derivative litigation. I discussed Council members' ongoing concerns about the independence of ADM's board of directors.

4. About a month later, Mr. Goldberg phoned to set up a meeting with the Council. In response to my request for a written summary of the lawsuit, he mailed a letter dated December 15, 1996 to the Council's offices. A true and correct copy of this letter is attached hereto as Exh. A.

5. In this letter, Mr. Goldberg stressed that the firm was interested in meeting with the Council and Council members to discuss "the troublesome systemic problems plaguing the ADM Board of Directors." Exh. A at 1. A primary goal of plaintiffs' lawsuit, according to Mr. Goldberg, was to "recover for ADM as much of the wasted $190 million as is reasonably and realistically pos-

sible from the culpable officers and directors." *Id.* at 2. Equally important, he continued, were "the structural problems with ADM's board." *Id.* Goldberg stated that "any resolution of this case requires us to seek various fundamental changes to the ADM board, its structure and the way [it] governs ADM." *Id.*

6. On December 19, a Council staffer spoke with Mr. Goldberg and Robert M. Roseman of Spector & Roseman, P.C. The Council forwarded its Bill of Rights and definition of "independent" director to the law firm of Spector & Roseman, P.C.

7. That was the Council's last substantive conversation about the lawsuit with counsel for plaintiffs. On May 30, a reporter from the *Wall Street Journal* called me to discuss the proposed settlement. Shortly thereafter, on June 3, an irate individual shareholder faxed a copy of the proposed settlement to the Council.

8. I analyzed the proposed settlement and determined that it makes no meaningful improvement in ADM's corporate governance, and, in my opinion, is not in the best interest of ADM or its shareholders. Most importantly, the proposed settlement's definition of "outside" (or independent) director falls significantly short of the Council's definition. While purportedly modeled after the Council's standard, the proposed settlement's definition added undefined "materiality" hurdles to various categories of "outside" directors that falsely classify "inside" directors as "outside" directors.

9. I immediately contacted Mr. Roseman to explain the Council's concerns with the proposed settlement definition and to clarify the impact of the materiality hurdles. In response to my criticism of the proposed definition, Mr. Roseman told me that ADM refused to accept the Council's more stringent definition of "outside" director. He explained that, under the Council's definition, the company

would be forced to remove certain directors from its board.

10. I asked Mr. Roseman to provide a written analysis of ADM's board using the proposed definition. Mr. Roseman's response is attached hereto as Exh. B. According to Mr. Roseman's analysis, the only ADM directors who do not qualify as "outside" directors are company chairman Dwayne Andreas, CEO G. Allen Andreas and Shreve Archer, father of ADM's treasurer. All of the remaining 10 board members qualify as "outside" directors under the proposed settlement's definition, even though four directors—two attorneys whose law firms provide legal services to the company, and two executives of companies or their affiliates that do business with ADM—have ongoing business relationships with ADM and accordingly are beholden to management. These four directors do not qualify as independent "outside" directors under the Council's definition or any other generally accepted standard of true independence.

11. ADM has been a poster child for the corporate governance movement for years. The settlement of this derivative action offers an unprecedented opportunity to implement changes in ADM's bylaws that will benefit ADM and its shareholders. This opportunity should not be squandered.

12. I do not believe that the proposed settlement is fair, reasonable, adequate, or in the best interest of ADM and its shareholders. Indeed, I do not believe that the proposed settlement offers any significant benefit to ADM or its shareholders.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2d day of July, 1997.

/s/ Ann L. Yerger
ANN L. YERGER

[Notarization and Exhibits Omitted in Printing]

ADDENDUM D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA, ILLINOIS

Case No. 95-2279

Honorable Harold A. Baker
Judge Presiding

PAUL FELZEN, TRUSTEE OF LOUISE LASKIN TRUST—1991 and SANDRA ESNER,
Plaintiffs,
v.
DWAYNE O. ANDREAS, *et al.*,
Defendants,
and
ARCHER DANIELS MIDLAND COMPANY,
a Delaware Corporation,
Nominal Defendant.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Consolidated C.A. No. 14403

IN RE: ARCHER DANIELS MIDLAND COMPANY

DECLARATION OF SARAH A.B. TESLIK

Sarah A.B. Teslik hereby declares pursuant to 28 U.S.C. § 1746:

1. I am over eighteen years of age and have personal knowledge of the matters stated herein.

2. I have been the Executive Director, attorney and principal staffer for the Council of Institutional Investors (the "Council") since its formation in 1985. The Council is a non-profit association of corporate, public and Taft-Hartley pension funds that addresses investment issues. Council members invest over a trillion dollars on behalf of millions of employees and beneficiaries. Objectors California Public Employees' Retirement System and the Florida State Board of Administration are members of the Council.

3. The Council is a very deliberate and cautious organization that only adopts policies on essentially unanimous votes, and only after careful research and discussion. The Council has adopted fewer than a dozen corporate governance policies in all of its years of existence. Each of these has been so basic that every one of the Council's corporate members has voted in favor of each of the policies put up to them for a vote, and most of the policies are standard operating procedure at most or many of the nation's largest companies.

4. The first and probably the most central of the Council's policies is its requirement that a majority of a corporation's directors be independent from potentially compromising financial, familial or professional relationships to the company. The Council defines independence for these purposes in a detailed definition which, in essence, defines a director as independent if his or her only non-trivial connection to the board is his or her board seat. Members adopted this definition after they agreed that a board was much less likely to perform properly its central

function as an independent oversight body if most of its individual members were not, in fact, independent. Without this foundation policy, members felt most other corporate governance standards and procedures were meaningless. The policy and definition were adopted with unanimous votes on April 5, 1991. A copy of this policy is attached hereto as Exhibit "A".

5. The other central policy of the Council is its position on confidential voting. Directors, of course, are elected by shareholders, and so the election process is the vital link that provides meaningful accountability to shareholders. When this policy was debated, members agreed unanimously that this link is weakened, threatened, or shattered if those who run for office count their own ballots. That is an election practice that members did not believe would be tolerated in any other part of American life and should not be tolerated in corporate elections either.

6. The Council therefore on June 23, 1989 unanimously adopted a policy, attached hereto as Exhibit "B", supporting a confidential ballot—supporting the idea, in other words, that neutral third parties selected by the corporation should count shareholders' proxies. With increasing numbers of employee and institutional service provider shareholders who could suffer retribution if they dared to cast votes against management, members believed that this policy would only become more important over time.

7. The Council's majority standard for board independence is so universally accepted that it is the standard now used by nearly 85 percent (84.7 percent) of S&P 500 companies. Indeed Council data indicate that only 17 companies of the 483 member of the S&P 500 surveyed by the Council have fewer independent directors than ADM.

8. In the proposed settlement ADM offers an independence standard and definition that are, in my opinion (a) completely meaningless because of clever modifying language; (b) virtually identical to changes already proposed by the company more than a year ago, and without reference to the derivative lawsuit; (c) worse (less protective of shareholders) than the standards already in place at all but 15 percent of S&P 500 companies; and (d) so completely dated in language as to be archaic.

9. The proposed settlement provides that directors will be deemed to be "outside" even if they have personal, business, or professional ties to the company and/or its senior management, unless the relationship is deemed by the company to be "*material to the company or to the director.*" With a company the size of ADM, I cannot imagine a single relationship any one person could ever have, personal, professional, or otherwise, to ADM that would be material *to ADM*. This standard is therefore, in my opinion, a standard that virtually no director can fail. And yet it was Council members' belief that even the smallest of financial or personal relationships can genuinely affect a person's independence because of its potential to affect *the person*.

10. The company offers this can't-fail-to-be-met standard despite the fact that the widely accepted Council standard was already submitted to it by two of its largest shareholders, and two of the largest Council members—the California Public Employees' Retirement System and the Florida State Board of Administration—and received an exceptionally high endorsement of 41.6 percent of voting shareholders at the company's October 17, 1996 annual meeting.

11. The offer in the proposed settlement that direct management representation on the board will be limited to no more than three seats was lifted almost verbatim from the *Governance Committee Report to the Board of Directors of Archer Daniels Midland Company* (Jan. 15,

1996), which is attached hereto as Exhibit "C". This Committee was established and acted prior to the filing of the lawsuit to which this proposed settlement is the proposed conclusion. The ADM board adopted all of the recommendations in the Report. *See* Exhibit "E". So shareholders gain nothing from this proposed settlement they did not already have. And they did not have anything innovative here in any event: according to Council data, this company suggestion is standard operating procedure at most S&P 500 companies anyway—86.5 percent have three or fewer executives on the board.

12. Similarly the concept of a "lead director" seems to me to be another essential repeat of a change already called for in the 1996 Report, with the renaming of the lead director as the vice chairman. A similar repackaging appears to have occurred with the settlement's proposal to establish a governance committee to assess board and committee effectiveness. Under current board policies the nominating committee is responsible for annual director "self-assessment and board evaluation," while all nonmanagement directors handle the "establishment and performance criteria for evaluation of the CEO." As a result, the creation of this separate corporate governance committee does not appear to represent any meaningful innovation from current company practice.

13. The proposed settlement's requirement that separate nominating, compensation and audit committees must be composed exclusively of outside directors was also lifted verbatim from the 1996 Report.

14. The proposed settlement does offer a version of confidential voting that was not contained in the Report. But it is, if anything, an even more meaningless provision, in my opinion, than the definition of independence used for directors. The proposed settlement indicates the company will grant shareholders confidential voting—but only, it seems, in those situations in which it is irrelevant —only in situations where there are no proxy contests or

solicitations. In these situations the proposed settlement indicates there will *not* be confidential voting. And, although it seems nearly irrelevant under the circumstances, the company also does not indicate whether in those trivial and routine situations in which votes will be tallied confidentially, the confidentiality will last only until the polls are closed or whether it is permanent. Other companies with confidential voting policies generally, in the Council's experience, make this clear—it is a distinction that matters a great deal, especially to individual employee shareholders.

15. I have compared the governance provisions of the proposed settlement with the provisions already accepted by the board in the 1996 Report. This comparison is summarized in Exhibit "D" hereto. In my opinion, the few items in the settlement that cannot be found in the Report are trivial and provide no benefit to shareholders. On balance, the proposed settlement is no improvement over the governance provisions already accepted in the Report. I am unable, therefore, to identify new, positive, and meaningful corporate governance changes offered in the proposed settlement. This is particularly surprising and disappointing since I personally, numerous Council members individually, and other members of Council staff repeatedly made offers to ADM directors, consultants and other representatives to provide information on independent directors and other core member and Council policies that could have formed the basis of a very limited and conservative but meaningful set of governance principles.

16. Since the proposed governance provisions offer nothing significantly new, the proposed settlement provides no value to ADM or to its shareholders. However, a *truly* independent board could add significant value. A recent study by the McKinsey & Co. consulting firm found that 50 money managers representing $850 billion in assets were willing to pay an 11 percent "good governance" premium. A discussion of this study is attached hereto as Exhibit "F".

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2d day of July, 1997.

/s/ Sarah A.B. Teslik
SARAH A.B. TESLIK

[Notarization and Exhibits A-E Omitted in Printing]

EXHIBIT F TO TESLIK DECLARATION

THE WALL STREET JOURNAL, MONDAY, JUNE 30, 1997

WHY INVESTORS PUSH FOR STRONG CORPORATE BOARDS

Manager's Journal
By Jennifer H. van Heeckeren

Trustees and staff of the California Public Employees' Retirement System are developing guidelines to grade companies in Calpers's portfolio on the independence of their boards. Calpers cannot be ignored: Its $80 billion in equities make it one of the nation's largest shareholders and a force to be reckoned with in the governance arena. A study I conducted with Diane Del Guercio at the University of Oregon shows that Calpers has the power to provoke significant change, such as takeover attempts, turnover, restructurings and asset sales.

CEOs would be wise to embrace the idea of strongly independent boards. For if investors can't get boards to work well, they may turn to other measures—sitting on boards themselves, lobbying for direct government regulation or supporting a return of corporate raiders.

The growing power and independence of boards reflects a reversal of a trend that dates to the early years of this century. A seminal event occurred in 1914, when repre-

sentatives of J.P. Morgan resigned from 30 company boards in a single day. They and other institutional investors had held sway in boardrooms for more than two decades, leaving CEOs with little real decision-making power. But as they came under critical public and political scrutiny, they beat a hasty retreat. Family owners were also losing influence, as founders aged and ownership tilted toward outsiders. So a new group of professional CEOs, bred in new management schools, took the reins of corporate America.

Their grip loosened in the 1950s, when an economic boom drove a wave of investors into stocks. Increased individual ownership heightened expectations and fed a belief in shareholder democracy. New regulations requiring the disclosure of senior-management pay, along with the rise of the corporate raider, spurred a growing number of contested elections for boards, known as proxy contests. After a concerted lobbying and publicity effort on governance issues by the Business Roundtable, new regulations in 1956 clamped down on proxy battles, and CEOs prevailed at the end of the decade.

Today institutional investment is again booming. After declining to as low as 15% in the 1940s, institutional ownership returned to turn-of-the-century levels of 50% and higher in the mid-1980s. Takeovers flourished in the '80s environment of few regulatory restrictions and easy financing via junk bonds. But public opinion turned against raiders, state regulations and court decisions made takeovers more difficult, junk bonds dried up, and management created innovative takeover defenses. Many CEOs believed they had won the governance battle.

CEOs who resist pressure for strong governance risk having Calpers or regulatory bureaucrats tell them what kind of board they should have.

But institutional investors looked for other ways to prod CEOs. In 1992 the Securities and Exchange Commission made it easier for investors to coordinate on governance issues. Shareholders issued "hit lists" of underperforming companies, announced shareholder proposals and communicated directly with management. But it didn't make sense for Calpers and other institutions to intervene in each of the thousands of companies whose stock they held. They have turned to boards—shareholders' elected representatives—as management watchdogs.

What do these investors want? The bottom line is long-term returns. The most active investors are pension funds with mind-boggling obligations. Calpers will need to be able to pay out $30 billion each year to its beneficiaries by 2020. Institutional investors rely on strong, independent boards to create shareholder value. They believe strong boards will help companies correct mistakes, recover from crises, and find, support and reward outstanding CEOs.

Numerous recent examples, along with academic research, support the notion that boards can have a significant impact on stock prices. Recent research by McKinsey in conjunction with Institutional Investor found that many large private money managers—especially those looking for long term value—are willing to pay a higher stock price for companies with good, independent board governance. We surveyed 50 money managers representing about $850 billion in assets, and found that they were willing to pay an 11% good-governance premium on average.

How should CEOs respond to the demand for strong, independent boards? Well-performing companies have the option of doing nothing for now—but only until there is a period of poor results, a complex acquisition, or a crisis. CEOs could search for ways to thwart investors, as they did in the 1980s. But underlying forces make this strategy unpromising. Institutional ownership will probably con-

tinue to increase. Public opinion is suspicious of CEOs, whose pay has dramatically increased while companies downsized. The most prominent investors, meanwhile, are more sympathetic—not the "greedy raiders" of the '80s, but institutions like Calpers, which pays the pensions of firemen, police officers and school librarians. Politicians aren't likely to attack these investors on behalf of CEOs. Finally, the SEC has been embracing a pro-shareholder stance that seems unlikely to change.

CEOs can benefit personally from strong, independent boards. As major stockholders themselves, they should pursue strategies that increase the stock price. Harmonious relations with investors enable CEOs to focus their time and energy on substantive business issues. CEOs will find, too, that investors are much more patient and understanding in bad times if they trust the board. And while a weak board may rubber-stamp the CEO's decisions when times are good, often its first response to a crisis is to fire the CEO—whereas a strong board with substantive knowledge of strategy and company performance will tend to support management.

CEOs who resist pressure for strong governance risk having Calpers or regulatory bureaucrats tell them what kind of board they should have—an outcome that serves no one's interest. After all, the best boards aren't built by outsiders. Only the CEO has the knowledge and the position to build the optimal board for his company. Rather than fight the tides, CEOs should take the lead by tailoring strong boards for their companies, and thereby shape the next era of corporate governance to their—and their shareholders'—benefit.

Ms. van Heeckeren is a consultant in McKinsey & Co.'s Cleveland Office. Robert Felton, a McKinsey partner, contributed to this article.